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## Touro Law Review

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Volume 16 | Number 2

Article 10

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2000

### Discrimination Cases In the Supreme Court's 1998 Term

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#### Recommended Citation

Kaufman, Eileen (2000) "Discrimination Cases In the Supreme Court's 1998 Term," *Touro Law Review*. Vol. 16 : No. 2 , Article 10.

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# DISCRIMINATION CASES IN THE SUPREME COURT'S 1998 TERM

Eileen R. Kaufman\*

Last year, I began my discussion by noting that the Supreme Court had decided a record number of statutory discrimination cases.<sup>1</sup> However, that record was exceeded this past term with the Court addressing issues arising under Title VII<sup>2</sup> which covers discrimination in employment, Title IX<sup>3</sup> which covers discrimination in schools, and most significantly, the Americans with Disabilities Act<sup>4</sup> (hereinafter "ADA") which prohibits discrimination based on disability. Overall, the term scored significant victories for employers who were given considerable latitude to set their own physical characteristic standards and who were, to a large extent, immunized from liability for punitive damages. [Consistent with themes sounded this morning by Professor Friedman, there was an unmistakable federalism motif playing in the background of some of these discrimination cases.]<sup>5</sup>

We will start with the ADA cases because they were undoubtedly among the most important and far reaching decisions of the term. These cases address basic and definitional issues and

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<sup>1</sup> See Eileen R. Kaufman, *Discrimination Cases In The Supreme Court's 1997 Term*, 15 TOURO L. REV. 935 (1999).

<sup>2</sup> See Civil Rights Act of 1964 §§ 701-718, 42 U.S.C. §§ 2000(e) 2000(e)(17) (1994) (which states in pertinent part: "It shall be an unlawful employment practice for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .").

<sup>3</sup> See Civil Rights Act of 1964, tit. IX, 20 U.S.C. §§ 1681-1688 (1994). For detailed discussion of the history of Title IX, see Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the Equal Opportunity Standard*, 1994 DET. C.L. REV. 953 (1994).

<sup>4</sup> 42 U.S.C. §§ 12101-12213 (1994).

<sup>5</sup> See Leon Friedman, *Supreme Court Federalism Decisions, 1998-1999 Term*, 16 TOURO L. REV. 243 (2000).

answer such fundamental questions as 1) whether an individual whose condition is mitigated by medicine or corrective device can assert an ADA claim when that individual was denied a job based on that condition; 2) whether an individual who has applied for or received social security disability benefits can establish a claim under the ADA; and 3) whether unnecessarily confining a mentally impaired individual in an institutional setting when a community setting is appropriate constitutes discrimination under the ADA.

The three cases that represent the Court's most significant pronouncement with respect to disability law, are *Sutton v. United Airlines*,<sup>6</sup> *Murphy v. United Parcel Service*,<sup>7</sup> and *Albertsons v. Kirkingburg*.<sup>8</sup> In these cases, the Court held that the determination of whether or not a person is disabled within the meaning of the ADA must be made by taking into account corrective or mitigating measures, like eyeglasses<sup>9</sup> or high blood pressure medicine,<sup>10</sup> or other compensatory measures, like the ability of the brain to subconsciously compensate for weaknesses.<sup>11</sup> Justice O'Connor authored *Sutton*<sup>12</sup> and *Murphy*<sup>13</sup> and Justice Souter authored *Albertsons*.<sup>14</sup> In each case, the vote was 7-2 with Justices Stevens and Breyer dissenting.

Before we turn to the cases, let me very briefly lay out the statutory scheme. Under the ADA,<sup>15</sup> an employer is prohibited from discriminating against a qualified individual with a disability because of the disability.<sup>16</sup> A qualified individual with a disability

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<sup>6</sup> *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999).

<sup>7</sup> *Murphy v. United Parcel Service*, 119 S. Ct. 2133 (1999).

<sup>8</sup> *Albertsons v. Kirkingburg*, 119 S. Ct. 2162 (1999).

<sup>9</sup> *Sutton*, 119 S. Ct. at 2149.

<sup>10</sup> *Murphy*, 119 S. Ct. at 2137.

<sup>11</sup> *Albertsons*, 119 S. Ct. at 2168 (citing 143 F.3d 1232 (9th Cir. 1998)).

<sup>12</sup> 119 S. Ct. 2139 (1999).

<sup>13</sup> 119 S. Ct. 2133 (1999).

<sup>14</sup> 119 S. Ct. 2162 (1999).

<sup>15</sup> 42 U.S.C §12182 (a) (1994). Section 12182 (a) provides in pertinent part: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *Id.*

<sup>16</sup> 42 U.S.C §12111 (8) (1994). Section 12111 (8) provides in pertinent part: "The term 'qualified individual with a disability' means an individual with a

is a person who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual seeks.<sup>17</sup> Most important to our purpose today, the statute defines the term disability in three ways: first, a physical or mental impairment that substantially limits a major life activity; second, a record of such impairment; or third, being regarded as having such an impairment.<sup>18</sup> It is the first and third definitions that are explored in these decisions.

The leading case in the trilogy is *Sutton v. United Airlines*,<sup>19</sup> involving twin sisters with severe myopia but whose vision was corrected to 20/20 with glasses.<sup>20</sup> They were employed as pilots for a regional airline and met federal standards for airline pilots.<sup>21</sup> The sisters applied for employment as commercial airline pilots with United Airlines, but were denied because that airline required uncorrected vision of 20/100 or better, a standard that the plaintiffs could not meet.<sup>22</sup>

Plaintiffs sued under the ADA, alleging that United Airlines had discriminated against them on the basis of their actual disability or alternatively, because they were regarded as having a disability.<sup>23</sup> The District Court dismissed their claim finding that they were not disabled because their condition had been corrected by eyeglasses or contact lenses, and they were not regarded as disabled because they had only alleged that the employer regarded them as unable to

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disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.*

<sup>17</sup> 29 U.S.C. § 705 (20) (B) (1994). Section 705 (20) (B) provides in pertinent part: "(A)ny person who (i) has a physical or mental impairment which substantially limits one or more of each person's major life activities; (ii) has a record of such impairment; or (iii) is regarded as having such an impairment." *Id.*

<sup>18</sup> 42 U.S.C. § 12102 (2) (1997). Section 12102 defines "disability" as the following: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.*

<sup>19</sup> 119 S. Ct. 2139 (1999).

<sup>20</sup> *Id.* at 2143.

<sup>21</sup> *Id.* at 2151.

<sup>22</sup> *Id.* at 2143.

<sup>23</sup> *Id.* at 2143-44.

perform a specific job.<sup>24</sup> The Tenth Circuit affirmed, placing that Circuit at odds with eight other Circuit Courts, including the Second Circuit,<sup>25</sup> that had all held that disability is to be determined *without* regard to mitigation.<sup>26</sup>

The Supreme Court affirmed, rejecting Equal Employment Opportunity Commission (hereinafter "EEOC") and Department of Justice interpretive guidelines that explicitly state that the disability determination is to be made without regard to mitigating measures.<sup>27</sup> These agency guidelines, Justice O'Connor wrote, are impermissible interpretations of the ADA for three reasons.<sup>28</sup> First, the ADA speaks in, what Justice O'Connor refers to as "the present indicative verb form," indicating that conditions must be currently disabling.<sup>29</sup> Second, the ADA requires individualized assessments of disability - what is this particular individual's condition - not speculative assessments about how a condition might affect a person.<sup>30</sup> Third, congressional findings refer to 43,000,000 disabled Americans, which is far less than the number would be if disability were determined without regard to mitigation.<sup>31</sup> These three provisions of the ADA, the Court concludes, make clear that disability must be determined with reference to corrective measures.<sup>32</sup> The Court did not look at the legislative history of the ADA, which, like the agency guidelines, clearly support evaluating disabilities in their uncorrected state.<sup>33</sup>

Under the Court's interpretation of the term "disability," the plaintiffs in *Sutton* were clearly not disabled since their corrected vision was 20/20 and therefore, they were not substantially limited

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<sup>24</sup> *Id.* at 2144.

<sup>25</sup> *See, e.g.,* Bartlett v. New York State Board of Law Examiners, 156 F.3d 321, 329 (2d Cir. 1998).

<sup>26</sup> *Sutton*, 119 S. Ct. at 2144.

<sup>27</sup> 29 CFR pt. 1630, App. § 1630.2(j) (1998); 28 CFR pt. 35, App. A, § 35.104 (1998).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 2147.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2149.

<sup>33</sup> *Id.*

in any major life activity.<sup>34</sup> For the same reason, the plaintiff in *Murphy v. United Parcel Service*, whose hypertension was controlled by medication, was not disabled within the meaning of the statute.<sup>35</sup> Similarly, the plaintiff in *Albertsons v. Kirkingburg*, with monocular vision, must have his disability measured in light of the fact that his brain had subconsciously compensated for his lack of binocular vision.<sup>36</sup>

However, *Albertsons* does not end with a determination that the plaintiff is not actually disabled under the statute. Plaintiffs had argued in the alternative that they were regarded as disabled, and according to the statute, that triggers coverage.<sup>37</sup> In these three cases, one might suppose that since there was no question that the plaintiffs were denied employment based on their physical condition, that they would satisfy the “regarded as” standard.<sup>38</sup> The Court disagreed. In order to be “regarded as” disabled under the ADA, the employer must regard the individual as substantially limited in a major life activity, and being ineligible for a particular job, does not suffice.<sup>39</sup> Rather, plaintiffs would presumably have to demonstrate that they are regarded as unable to work in a broad class of jobs.<sup>40</sup>

The upshot of the decision is that it clearly authorizes employers to set their own employment criteria.<sup>41</sup> The Court explicitly tells employers that they are free to prefer some physical characteristics over others, to establish physical criteria, and to reject job

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<sup>34</sup> *Id.* (noting “(t)he use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting.”). *Id.*

<sup>35</sup> 119 S. Ct. 2133 (1999).

<sup>36</sup> 119 S. Ct. 2162 (1999).

<sup>37</sup> *Murphy*, 119 S. Ct. at 2138.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* Citing 29 C.F.R. § 1630.2 (j)(3) (1999), which states: “[t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” *Id.*

<sup>40</sup> *Id.* at 2139.

<sup>41</sup> *Sutton*, 119 S. Ct. at 2150.

applicants based on a physical impairment, so long as the impairment, due to its correction, does not qualify as a disability under the ADA.<sup>42</sup>

Justice Stevens, along with Justice Breyer, vigorously dissented, arguing that the legislative history as well as the guidelines issued by the EEOC, the Justice Department and the Department of Transportation make it “abundantly clear that Congress intended the ADA to cover individuals who could perform all of their major life activities only with the help of ameliorative measures.”<sup>43</sup> As an example, the dissenters cite the Senate Report which state that the purpose of the “regarded as” definition of disability is to ensure that “persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified, and such denials are the result of negative attitudes and misinformation.”<sup>44</sup>

The dissent thus concludes that the Act “generally protects individuals who have ‘correctable’ substantially limiting impairments from unjustified employment discrimination on the basis of those impairments.”<sup>45</sup> Under this view, would employers like a commercial airline be forced to hire someone who could endanger the lives of passengers? No, according to the dissent, because under the statute, a disabled person must be qualified [with or without reasonable accommodation] for the job and even then, an employer may avoid liability by showing that its employment qualification is job related and consistent with business necessity or that it is justified to prevent a health or safety hazard.<sup>46</sup>

Thus, according to the dissent, this case merely raises the threshold question of whether or not the plaintiffs are disabled within the meaning of the Act, not whether the employer, by

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2154.

<sup>44</sup> *Id.* at 2155. The Dissent is referring to and quoting S. REP. NO. 101-116, at 23 (1989).

<sup>45</sup> *Id.* at 2156.

<sup>46</sup> *Id.*

requiring a certain physical characteristic violated the statute.<sup>47</sup> This case just “asks whether the ADA lets the petitioners in the door”.<sup>48</sup> The dissent says: “Inside that door lies nothing more than basic protection from irrational and unjustified discrimination because of a characteristic that is beyond a person’s control.”<sup>49</sup>

The dissent concludes by caustically referring to the Court’s “crabbed vision” of the ADA, pointing out that “the vision of appellate judges is sometimes obscured by a concern that their decision will legalize issues best left to the private sphere or will magnify the work of an already-burdened judiciary.”<sup>50</sup>

The decision, not surprisingly, was praised by groups representing employers and roundly criticized by groups representing the disabled. Professor Feldman, from Georgetown Law School, who helped draft the ADA, said the decisions “create the absurd result of a person being disabled enough to be fired from a job, but not disabled enough to challenge the firing.”<sup>51</sup> On the other hand, Stephen Bokor, General Counsel for the United States Chamber of Commerce praised the Court and said “the statute protects you from discrimination in a class of jobs, but it does not guarantee you a particular job.”<sup>52</sup>

Before leaving these three cases, I should add a word about *Albertsons v. Kirkingburg*,<sup>53</sup> because that case went beyond holding that plaintiff’s disability, which consisted of monocular vision, must be measured in light of his ability to compensate for that condition.<sup>54</sup> The other issue addressed in *Albertsons* is whether, under the ADA, an employer who adopts as a job qualification, a waivable federal safety regulation, must then justify the qualification as job related and consistent with business

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 2162.

<sup>51</sup> Linda Greenhouse, *High Court Limits Who Is Protected By Disability Law*, N.Y. TIMES, June 23, 1999, at A1.

<sup>52</sup> *Id.*

<sup>53</sup> 119 S. Ct. 2162 (1999).

<sup>54</sup> *Id.* at 2169.



necessity.<sup>55</sup> The Court held that the ADA imposes no such obligation on the employer.<sup>56</sup> The job qualification at issue in *Albertsons* was the vision standard of the Federal Motor Carrier Safety Regulations, which *Albertsons* was required to follow.<sup>57</sup> However, the regulations established an experimental waiver program and the plaintiff argued that in light of the waiver program, the employer could not rely on the federal regulation without justifying that reliance.<sup>58</sup> The Court disagreed and essentially held that employers need not justify qualification standards imposed by federal safety regulations even when those regulations are subject to waiver.<sup>59</sup>

The next ADA case is *Cleveland v. Policy Management Systems Inc.*,<sup>60</sup> in which the issue was whether an individual in receipt of social security disability benefits could simultaneously pursue a claim under the ADA.<sup>61</sup> Justice Breyer, writing for a unanimous Court, concluded that the Social Security Act does not foreclose the pursuit of an ADA claim, nor create a presumption against the ADA plaintiff.<sup>62</sup>

In order to receive disability benefits under the Social Security Act, the individual must be unable to engage in substantial gainful

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<sup>55</sup> *Id.* at 2170; See 42 U.S.C. § 12113(a), which states in pertinent part: "It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter." *Id.*

<sup>56</sup> *Id.* at 2174.

<sup>57</sup> *Id.* at 2169 (citing Department of Transportation's Motor Carrier Safety Regulations, 49 CFR § 391.41 (b)(10)(1998)) (stating in pertinent part: "Physical qualifications for drivers, [must have] distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/20 (Snellen) or better with corrective lenses. . . and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber." ). *Id.*

<sup>58</sup> *Albertsons*, 119 S. Ct. at 2174.

<sup>59</sup> *Id.*

<sup>60</sup> *Cleveland v. Policy Management Sys.*, 119 S. Ct. 1517 (1999).

<sup>61</sup> *Id.* at 1599.

<sup>62</sup> *Id.* at 1600.

employment.<sup>63</sup> This means that the individual cannot perform his/her past work nor engage in any kind of substantial gainful work that exists in the national economy – a very tough standard to meet.<sup>64</sup> The question in *Cleveland* concerned the apparent inconsistency between claiming to be *unable* to engage in substantial gainful employment pursuant to the Social Security Act and claiming to be *able* to perform the essential functions of a specific job pursuant to the ADA.<sup>65</sup> The plaintiff, Carolyn Cleveland, worked for Policy Management System, where her tasks included performing background checks on prospective employees.<sup>66</sup> After suffering a stroke that damaged her concentration, memory, and language skills, Ms. Cleveland applied for social security disability benefits and stated, in her application, that she was disabled and unable to work.<sup>67</sup> Approximately three months later, before any action had been taken on her social security application, Ms. Cleveland's condition improved.<sup>68</sup> She returned to work and notified the Social Security office, which thereupon denied her application.<sup>69</sup> However, a few days after the Social Security Administration denied her application on the ground that she had returned to work, plaintiff was fired.<sup>70</sup> She requested the Social Security office to reconsider its denial and after a hearing, she was awarded social security disability benefits retroactive to the date of her stroke.<sup>71</sup> One week before that award,

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<sup>63</sup> *Id.* at 1601 (citing 42 U.S.C § 423 (d)(1)(A) (1995)). The Act requires that the "inability to engage in any substantial gainful activity by reason of any . . . physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." *Id.*

<sup>64</sup> *Id.* (citing 42 U.S.C §423 (d)(2)(A) 1995), which states that the individual's impairment must be "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ." *Id.*

<sup>65</sup> *Cleveland*, 119 S. Ct. at 1600-1601.

<sup>66</sup> *Id.* at 1600.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

Ms. Cleveland commenced an action under the ADA, claiming that her employer had fired her without offering her proper accommodations in violation of the ADA.<sup>72</sup>

The district court did not reach the accommodations issue because it found that she was estopped from pursuing her ADA claim in light of her receipt of disability benefits. This fact, therefore, prevented her from establishing an essential element of her ADA claim, namely that she could perform the essential functions of her job.<sup>73</sup> The Fifth Circuit affirmed, holding that “the application for and receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient, . . . is judicially estopped from asserting that she is a qualified individual with a disability.”<sup>74</sup>

The Supreme Court unanimously reversed finding that, although the two statutory schemes create an appearance of conflict, “the two claims do not inherently conflict to the point where courts should apply a special negative presumption . . . because there are too many situations where a social security disability claim and an ADA claim “can comfortably exist side by side.”<sup>75</sup> How can these claims co-exist? Easily. First, the ADA defines a qualified person as a disabled person who can perform the essential functions of the job *with reasonable accommodations*, whereas the Social Security Act does not take the possibility of reasonable accommodations into account<sup>76</sup> in determining whether an individual is disabled for purposes of receiving disability benefits. Thus, an ADA claim based on an employer’s failure to provide reasonable accommodations can be reconciled with an application for disability benefits which asserts that without the accommodations,

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<sup>72</sup> *Id.*

<sup>73</sup> *Cleveland v. Policy Management Sys.*, 119 S. Ct. 1597, 1600 (1999).

<sup>74</sup> *Cleveland*, 120 F.3d 513, 518 (5<sup>th</sup> Cir.1997).

<sup>75</sup> *Cleveland v. Policy Management Sys.*, 119 S. Ct. 1597 (1999)

<sup>76</sup> *Id.* at 1600-01. The Court referred to the pertinent part of the ADA which states that “with reasonable accommodation” may include: “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified of qualified readers or interpreters, and other similar accommodations.” *Id.* (quoting 42 U.S.C. § 12111 (9) (B) 1995).

the applicant is unable to work.<sup>77</sup> Second, given the huge volume of social security disability applications, the decision making process utilizes a number of presumptions and that kind of process does not lend itself to highly individualized determinations.<sup>78</sup> Third is timing.<sup>79</sup> A disabling condition may change over time so that assertions about total disability may not reflect the declarant's actual condition at the time of the contested employment decision.<sup>80</sup> In fact, under the Social Security Act, a recipient may receive benefits for a nine month trial work period to facilitate that person's re-entry into the workplace.<sup>81</sup> Finally, there is nothing unusual in permitting litigants to assert alternate theories, regardless of consistency.<sup>82</sup> The legal system allows this all the time. For all these reasons, the Court held that it would be unfair to apply a negative presumption to the ADA plaintiff who has applied for or received social security benefits.<sup>83</sup>

Although a negative presumption is unwarranted,<sup>84</sup> the employer may be entitled to summary judgment where the plaintiff fails to offer a sufficient explanation of what would otherwise appear to be an inherent inconsistency between her declaration to the Social Security Administration that she is unable to work and her assertion in the ADA claim that she is able.<sup>85</sup> Thus, to defeat summary judgment, the ADA plaintiff must proffer a sufficient explanation "to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation'." <sup>86</sup> A sensible decision that basically requires the plaintiff to explain away the apparent inconsistency.

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<sup>77</sup> *Id.* at 1602.

<sup>78</sup> *Id.*

<sup>79</sup> *Cleveland*, 119 S. Ct. at 1603.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1604.

The last case involving the ADA is *Olmstead v. Zimring*.<sup>87</sup> Unlike the previous four cases which deal with Title I covering employment discrimination,<sup>88</sup> *Olmstead* required the Court to venture into Title II<sup>89</sup> which prohibits discrimination in public services furnished by governmental entities.<sup>90</sup> Implementing regulations require that services and programs be administered “in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”<sup>91</sup> The most integrated setting standard is defined as a “setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.”<sup>92</sup> The regulations further require public entities to make “reasonable modifications” in their programs to avoid discrimination, unless those modifications would entail a “fundamental alteration” of the state’s program.<sup>93</sup>

The two plaintiffs in this case challenged their confinement in Georgia Regional Hospital, after their treating physicians had determined that they could be appropriately treated in a community-based setting.<sup>94</sup> The district court agreed, rejecting defendant’s argument that inadequate funding, rather than discrimination, explained the plaintiffs’ retention in an institutional setting. The court held that “unnecessary institutional segregation of the disabled constitutes discrimination per se, which cannot be

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<sup>87</sup> 119 S. Ct. 2176 (1999).

<sup>88</sup> See, *Sutton v. United Airlines*, 119 S. Ct. 2139 (1999); *Murphy v. United Parcel Service*, 119 S. Ct. 2133 (1999); *Albertsons v. Kirkingburg*, 119 S. Ct. 2162 (1999); *Cleveland v. Policy Management Sys.*, 119 S. Ct. 1597 (1999).

<sup>89</sup> 42 U.S.C. §§ 12131-12165 (1995).

<sup>90</sup> *Id.* The provision of Title II of the ADA states in pertinent part: Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” “Public entity” includes “any State or local government, and any department, agency or special purpose district. *Id.*

42 U.S.C. §§ 12131 (1)(A), (B).

<sup>91</sup> *Olmstead v. Zimring*, 119 S. Ct. 2176, 2183.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* L.C. and E.W. are mentally retarded women. L.C. also has been diagnosed with schizophrenia, and E.W. with a personality disorder. Both women have a history of treatment in institutional settings. *Id.*

justified by a lack of funding.”<sup>95</sup> The Eleventh Circuit agreed, although it found that, under certain circumstances, the state’s lack of resources could constitute a defense.<sup>96</sup>

The Supreme Court, with Justice Ginsburg writing for a 6-3 majority, affirmed the Court of Appeals in substantial part, agreeing that “unjustified isolation is properly regarded as discrimination based on disability” within the meaning of the statute.<sup>97</sup> However, the Court held that the obligation to care for people in community based settings could be limited by the state’s available resources.<sup>98</sup> In evaluating the state’s defense, courts must consider the cost of providing community-based care, the range of services the state provides to others with mental disabilities, and the state’s obligation to mete out these services equitably.<sup>99</sup> Thus, we are told, if a state were to demonstrate that “it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated, the reasonable modifications standard would be met.”<sup>100</sup>

The holding of the case is that “states are required to provide community-based treatment for persons with mental disabilities when the State’s treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.”<sup>101</sup>

In a concurring opinion, Justice Kennedy warned of the potential dangers of deinstitutionalization and counseled for a cautious and circumspect application of the Court’s decision, lest it be interpreted in a way that drives states to move persons in need of

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<sup>95</sup> *Zimring v. Olmstead*, 1997 WL 148674 (N.D. Ga. 1997).

<sup>96</sup> *Zimring v. Olmstead*, 149 F.3d 1197 (11<sup>th</sup> Cir. 1998).

<sup>97</sup> *Olmstead*, 119 S. Ct. at 2185.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 2189.

<sup>101</sup> *Id.* at 2190.

insitutionalization to insufficiently supervised settings out of a fear of litigation.<sup>102</sup>

Justice Thomas filed a dissenting opinion, joined by Chief Justice Rehnquist and Justice Scalia, in which he argued that the majority has created a “new species of discrimination” bearing no relationship ‘to the traditional understanding of the word discrimination which requires some sort of disparate or differential treatment.’<sup>103</sup> Further, he laments the “significant federalism costs” imposed by the majority which in effect directs states how to make decisions about their delivery of services.<sup>104</sup>

Parenthetically, one of the plaintiffs in *Olmstead* is now living in a three person group home and the other is living in her own apartment with supportive services.<sup>105</sup>

In addition to these important ADA cases,<sup>106</sup> the Court also decided three sex discrimination cases, one arising under Title IX<sup>107</sup> and two arising under Title VII.<sup>108</sup> These cases represent the Court’s continued effort to define the liability of schools<sup>109</sup> and employers for discrimination,<sup>110</sup> themes we addressed last year at this conference.<sup>111</sup>

In *Davis v. Monroe County Board of Education*,<sup>112</sup> the Supreme Court held that a private cause of action for damages under Title

<sup>102</sup> *Id.* at 2191 (Kennedy, J., concurring).

<sup>103</sup> *Id.* at 2198 (Thomas, J., dissenting).

<sup>104</sup> *Id.*

<sup>105</sup> See Linda Greenhouse, *States Limited on Institutionalization*, N.Y. TIMES, June 23, 1999, at A16.

<sup>106</sup> See *supra* note 94 and accompanying text.

<sup>107</sup> See *Davis v. Monroe Co. Bd. of Educ.*, 119 S. Ct. 1661 (1999); see also Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.* (hereinafter Title IX).

<sup>108</sup> See *West v. Gibson*, 119 S. Ct. 1906 (1999); *Kolstad v. American Dental Association*, 119 S. Ct. 2118 (1999); see also Title VII of Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1) which provides, in relevant part, that “[I]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .” (hereinafter “Title VII”). *Id.*

<sup>109</sup> See *supra* note 107 and accompanying text.

<sup>110</sup> See *supra* note 108 and accompanying text.

<sup>111</sup> See Kaufman, *supra* note 1, at 935-952.

<sup>112</sup> *Davis*, 119 S. Ct. 1661.

IX may be brought against a school district in cases of student-on-student sexual harassment, but only when the school district acts with deliberate indifference to known acts of harassment and only when the harassment is so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.<sup>113</sup>

This decision was somewhat predictable because the Court had adopted substantially the same standard one year earlier in *Gebser v. Lago Vista Independent School District*<sup>114</sup> in the context of teacher-on-student harassment.<sup>115</sup> Justice O'Connor authored both opinions<sup>116</sup> but interestingly in *Gebser*, she was writing against a dissent<sup>117</sup> that vigorously argued that few Title IX plaintiffs who have been victims of intentional discrimination will be able to recover damages under this exceedingly high standard,<sup>118</sup> whereas in *Davis*, she wrote against a dissent that argued just as vigorously that too many Title IX plaintiffs would be able to recover<sup>119</sup> and the four justices that formed Justice O'Connor's majority in *Gebser*<sup>120</sup> were the four who dissented in *Davis*.<sup>121</sup>

In *Davis*, a fifth grade student, LaShonda, was subjected to repeated acts of sexual harassment by a classmate,<sup>122</sup> referred to in the opinion as G.F, who eventually was convicted of sexual battery

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<sup>113</sup> *Id.*

<sup>114</sup> 524 U.S. 274 (1998) (holding that a school district is not liable for the discriminatory conduct of a teacher unless it had actual notice and exhibited deliberate indifference to the discrimination). *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See the majority opinions of *Gebser*, 524 U.S. 274 (1999) and *Davis*, 119 S. Ct. 1661 (1999).

<sup>117</sup> *Gebser*, 524 U.S. at 284. The dissent argued that imposing vicarious liability made sense because it serves to induce the school district to adopt and enforce practices to prevent this kind of behavior, and that the rule adopted by the majority does exactly the opposite. *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Davis*, 119 S. Ct. at 1685 (Kennedy, J., dissenting).

<sup>120</sup> *Gebser*, 524 U.S. at 276. Chief Justice Rehnquist, Scalia, Kennedy and Thomas joined Justice O'Connor in the opinion of the court. *Id.* at 276.

<sup>121</sup> See *Davis*, 119 S. Ct. at 1677. In *Davis*, Justices Kennedy, Scalia and Thomas along with Chief Justice Rehnquist dissented. *Id.* at 1677.

<sup>122</sup> *Davis*, 119 S. Ct. at 1666.



against her.<sup>123</sup> Over many months, G.F. acted in a sexually suggestive way, rubbing his body against LaShonda, placing a door stop in his pants, attempting to touch LaShonda's breasts and genital areas, and making sexual comments to her.<sup>124</sup> According to the complaint, LaShonda's grades suffered as a result of this prolonged pattern of harassment,<sup>125</sup> she expressed fears about how long she could keep G.F. off of her, and she wrote a suicide note which her father discovered.<sup>126</sup>

LaShonda's mother repeatedly complained to teachers and to the principal but no disciplinary action was taken against G.F. nor was any attempt made to separate the two students.<sup>127</sup> After three months of complaining, LaShonda was finally permitted to change her seat in class.<sup>128</sup>

LaShonda's mother filed suit against the school district, seeking compensatory and punitive damages.<sup>129</sup> The district court dismissed the claim, finding that Title IX does not encompass claims of student-on-student harassment and the Eleventh Circuit, sitting en banc, agreed.<sup>130</sup>

Justice O'Connor wrote for the bitterly divided 5-4 majority,<sup>131</sup> reversing the Eleventh Circuit and holding that Title IX does encompass damage claims based on student-on-student harassment,<sup>132</sup> however only under very proscribed circumstances.<sup>133</sup> The Court framed the issue in terms of whether the misconduct identified in *Gebser* that gives rise to a damages claim under Title IX – deliberate indifference to known acts of

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1666. G.F. told LaShonda, "I want to get in bed with you and I want to feel your boobs." *Id.*

<sup>125</sup> *Id.* The harassment began in January 1993, and ended finally in mid-May, when G.F. was charged with and pled guilty to sexual battery for his misconduct. *Id.*

<sup>126</sup> *Davis*, 119 S. Ct. at 1667.

<sup>127</sup> *Id.* at 1667.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1668.

<sup>130</sup> *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11<sup>th</sup> Cir. 1996).

<sup>131</sup> *Davis*, 119 Sup Ct. at 1667.

<sup>132</sup> *Davis*, 119 S. Ct. 1661.

<sup>133</sup> *Id.* at 1671.

harassment of a student by a teacher – is equally actionable when the harasser is a student rather than a teacher.<sup>134</sup> The Court concluded that it is but only “in certain limited circumstances”<sup>135</sup> – when the school district exercises substantial control over both the harasser and the context in which the known harassment occurs, or expressed in other words, when the harasser is under the school’s disciplinary authority.<sup>136</sup> Applying that standard to the facts at bar, the Court had little trouble concluding that, since the misconduct occurred during school hours and on school grounds, the district had substantial control over the context as well as over the harasser.<sup>137</sup>

What must a school district do when it learns of student-on-student sexual harassment? Is expulsion of the harassing student always required? No, according to Justice O’Connor.<sup>138</sup> Rather, school districts retain flexibility in reacting to peer harassment and incur liability only when their response is clearly unreasonable in light of the known circumstances.<sup>139</sup> Indeed, Justice O’Connor cautions that courts should not second guess disciplinary decisions made by school administrators and even suggests that courts should not refrain from dismissing cases at the pleadings stage or on summary judgment based on a determination that the school’s response was not “clearly unreasonable.”<sup>140</sup>

The Court made clear that not all forms of sexual harassment constitute proscribed discrimination within the meaning of Title IX. Only sexual harassment that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school support an action for damages under Title IX.<sup>141</sup>

The Court provided an example from each end of the spectrum.<sup>142</sup> The most obvious example of actionable peer

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1672.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1675.

<sup>142</sup> *Id.*

harassment, according to the Court, would be “the overt, physical deprivation of access to school resources” as where male students physically threaten female students and prevent their use of a particular school resource such as a computer lab or an athletic field.<sup>143</sup> If the school district was made aware of this conduct and failed to take any action, that would constitute deliberate indifference which would be actionable.<sup>144</sup> At the other end of the spectrum are what the Court refers to as simple acts of teasing and name-calling, which will not support an action for damages, even when the comments target differences in gender.<sup>145</sup> In between, the Court directs a consideration of the entire constellation of surrounding circumstances, including, of course, the ages of the harasser and the victim.<sup>146</sup>

Applying these standards to the case at hand, the Court concluded that it was error to dismiss petitioner’s case, given 1) the allegations regarding prolonged sexual harassment that was severe, pervasive, and objectively offensive; 2) the allegations that the harassment had a concrete, negative effect on LaShonda’s ability to receive an education; and 3) the allegations that the school district had actual knowledge yet made no effort whatsoever to investigate or stop the harassment.<sup>147</sup>

Justice Kennedy wrote a lengthy and angry dissent,<sup>148</sup> joined by the Chief Justice and Justices Scalia and Thomas, in which he forecasts an uncontrollable flood of lawsuits against school districts, who, in an effort to protect themselves against crushing liability, will adopt ludicrous measures such as suspending a six year old boy for kissing a female classmate as a North Carolina school district did.<sup>149</sup> Of interest to this audience may be Justice Kennedy’s prophecy that the majority decision “will support untold numbers of lawyers.”<sup>150</sup>

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1676.

<sup>148</sup> *Id.* at 1677 (Kennedy, J., dissenting).

<sup>149</sup> *Id.* at 1689-90.

<sup>150</sup> *Id.* at 1691.

Based on Spending Clause jurisprudence, the dissent argued that under no circumstances should Title IX be read to encompass damage claims based on student-on-student harassment because Congress failed to give sufficiently clear notice to the states that their acceptance of federal funding would subject them to these damage claims.<sup>151</sup>

To the dissent, “this case is about federalism.”<sup>152</sup> Justice Kennedy writes “I can conceive of few interventions more intrusive upon the delicate and vital relations between teacher and student, between student and student, and between the State and its citizens than the one the Court creates today by its own hand.”<sup>153</sup> Trusted principles of federalism are superseded by a more contemporary imperative.”<sup>154</sup> (Is Justice Kennedy accusing the Court of political correctness?) Justice Kennedy worries that “The Nation’s schoolchildren will learn their first lessons about federalism in classrooms where the federal government is the ever-present regulator . . . After today, Johnny will find that the routine problems of adolescence are to be resolved by invoking a federal right to demand assignment to a desk two rows away.”<sup>155</sup>

When Justice O’Connor announced the Court’s decision on May 24, 1999, she responded to Justice Kennedy who, she said, maintained that the ruling would “teach little Johnny a perverse lesson in Federalism.” Rather, she said, the majority believed the decision “assures that little Mary may attend class.”<sup>156</sup>

The last two discrimination cases of the term are two Title VII<sup>157</sup> cases: *West v. Gibson*.<sup>158</sup> dealing with compensatory

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<sup>151</sup> See *Davis*, 119 S. Ct. at 1677.

<sup>152</sup> *Id.* at 1691.

<sup>153</sup> *Id.* at 1692.

<sup>154</sup> *Id.*

<sup>155</sup> *Davis*, 119 S. Ct. at 1677.

<sup>156</sup> *Id.*

<sup>157</sup> Title VII of Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1) (1995)) provides, in relevant part, that “[I]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .” *Id.*

<sup>158</sup> 119 S. Ct. 1906 (1999).

damages and *Kolstad v. American Dental Association*<sup>159</sup> dealing with punitive damages.

In *West*, the Court held that the EEOC has the power to award compensatory damages.<sup>160</sup> Justice Breyer, writing for the majority,<sup>161</sup> concluded that when Congress amended the statute in 1991<sup>162</sup> to authorize the recovery of compensatory damages, it effectively gave the EEOC the power to award compensatory damages.<sup>163</sup> Since the statute explicitly gives the EEOC the authority to enforce the Act through “appropriate remedies”<sup>164</sup> and since the 1991 amendment made compensatory damages a newly recognized appropriate remedy, the EEOC has the power to award compensatory damages.<sup>165</sup>

Like *Davis*,<sup>166</sup> this case was a 5-4 decision with the same four justices writing in dissent (Kennedy, Rehnquist, Scalia and Thomas)<sup>167</sup>. The dissent argued that the EEOC could not award compensatory damages against the federal government in the absence of a clear and express waiver of sovereign immunity, which the dissenters failed to find in the relevant statutory provisions.<sup>168</sup>

The second Title VII case of the term, *Kolstad v American Dental Association*,<sup>169</sup> ostensibly concerned the standard for

<sup>159</sup> 119 S. Ct. 2118 (1999).

<sup>160</sup> *West*, 119 S. Ct. at 1909-10.

<sup>161</sup> *Id.* at 1908.

<sup>162</sup> Civil Rights Act of 1991, 105 Stat. 1072, 42 U.S.C. § 1981a(a)(1) (1995). The Court referred to the pertinent parts of the Compensatory Damages Amendment: “In an action brought by a complaining party under section 706 [discrimination by private employers] or 717 [discrimination by the Federal Government] against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory damages.” *Id.*

<sup>163</sup> *West*, 119 S. Ct. at 1909-10.

<sup>164</sup> *Id.* (citing 42 U.S.C § 2000e-16(b) (1995)).

<sup>165</sup> *See id.* at 1909-10.

<sup>166</sup> 119 S. Ct. 1661.

<sup>167</sup> *West*, 119 S. Ct. at 1913.

<sup>168</sup> *Id.* at 1913-14.

<sup>169</sup> *Kolstad*, 119 S. Ct. 2118.

awarding punitive damages<sup>170</sup> but, in an unusual move, the Court reached beyond the punitive damages question to address the question of respondeat superior liability for punitive damages.<sup>171</sup> It should be noted that while *Kolstad* was a Title VII<sup>172</sup> case, the decision affects the ADA as well because the punitive damages statute at issue, section 1981a,<sup>173</sup> applies to both Title VII and the ADA.<sup>174</sup>

Carole Kolstad brought a Title VII action based on her claim that she had been passed over for promotion due to her sex.<sup>175</sup> The jury returned a verdict in her favor and awarded her \$52,718 but the court refused to charge the jury on punitive damages.<sup>176</sup> The D.C. Circuit *en banc* affirmed in a 6-5 decision,<sup>177</sup> holding that punitive damages may only be awarded upon a showing of egregious misconduct, which plaintiff had failed to show.<sup>178</sup>

The Supreme Court, with Justice O'Connor writing for the majority, concluded that an award of punitive damages is not dependent on a showing of egregious behavior.<sup>179</sup> Rather, the statutory standard, which authorizes punitive damages when the employer engages in discriminatory practices with "malice or with reckless indifference to the federally protected rights of the aggrieved individual" is a state of mind standard.<sup>180</sup> This differs

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<sup>170</sup> *Id.* at 2124. The Court determined that Congress intended to impose "two standards of liability [under 42 U.S.C. § 1981a]—one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award." *Id.*

<sup>171</sup> *Id.* at 2127-29.

<sup>172</sup> Title VII of Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1) (1995)).

<sup>173</sup> 42 U.S.C. § 1981a (1995). The statute states in pertinent part that "[a] complaining party may recover punitive damages . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1) (1995).

<sup>174</sup> 42 U.S.C. § 1981a provides a right of recovery for damages in cases of intentional discrimination in employment.

<sup>175</sup> *Kolstad v. American Dental Ass'n*, 912 F.Supp. 13, 14 (D.D.C. 1996).

<sup>176</sup> *Id.*

<sup>177</sup> *Kolstad v. American Dental Ass'n*, 139 F.3d 958, 960 (D.C. Cir. 1998).

<sup>178</sup> *Id.*

<sup>179</sup> *Kolstad*, 119 S. Ct. at 2124.

<sup>180</sup> *Id.* at 2125.

from an egregiousness standard that focuses more on the character of the *conduct* than on the state of mind of the actor.<sup>181</sup> While egregious conduct may evidence the requisite state of mind, it is not required under the statute.<sup>182</sup> Further, the Court held that the terms “malice” and “reckless indifference” refer “to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.”<sup>183</sup> Under this standard, not every act of intentional discrimination will warrant a punitive damages award.<sup>184</sup> for example, where the employer is unaware of the relevant federal prohibition or where the employer believes that its discrimination is lawful or where plaintiff’s theory of recovery is novel or where the employer reasonably believes that its discrimination fits within a statutory exception to liability.<sup>185</sup> On this point, seven justices were in agreement.<sup>186</sup> So far, so good.

Far more controversial than the actual holding in *Kolstad* was that portion of the opinion that addressed an issue not briefed nor argued by the parties nor addressed by the Circuit Court and suggested only in an amicus brief filed by the United States Chambers of Commerce<sup>187</sup>— namely under what circumstances an

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<sup>181</sup> *Id.* at 2126.

<sup>182</sup> *Id.* at 2125.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* The Court referred to 42 U.S.C. § 2000e-2(e)(1) (1995), a Title VII defense which spells out bona fide occupational qualifications, and provides that:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

*Id.*

<sup>186</sup> *Kolstad*, 119 S. Ct. at 2118.

<sup>187</sup> *Id.* at 2125.

employer can be vicariously liable for punitive damages.<sup>188</sup> Indeed, *Kolstad* would appear to be a peculiar vehicle to address this issue given the high position of the wrongdoers, one was the executive director and the other was the acting head of the Washington office.<sup>189</sup> The Court, this time in a 5-4 split<sup>190</sup> decided that “an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer’s ‘good-faith efforts to comply with Title VII.’”<sup>191</sup> In formulating this defense, the Court drew, selectively, on agency principles. On the one hand, the Court adopted the common law view that places strict limits on the imputation of an agent’s misconduct to the principal for purposes of punitive damage awards.<sup>192</sup> On the other hand, the Court rejected the Restatement of Agency’s<sup>193</sup> view that employers may be liable for punitive damages based on intentional misconduct by managerial employees within the scope of employment even when that conduct has been prohibited by the employer.<sup>194</sup> This, the Court said, would penalize employers who educate themselves about Title VII and would reduce the incentive for employers to adopt programs and policies designed to prevent discrimination in the workplace.<sup>195</sup> Clearly, the Court disapproved of holding employers liable for punitive damages when they have made good faith efforts to comply with Title VII.<sup>196</sup>

This approach of offering employers an affirmative defense is consistent with the approach adopted by the Court the previous term in *Burlington Industries v. Ellerth*<sup>197</sup> and *Faragher v. City of Boca Raton*,<sup>198</sup> where the Court offered employers an affirmative

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 2122.

<sup>190</sup> *Id.* at 2127. “Justice Stevens urges that we should not consider these limitations here.” *Id.*

<sup>191</sup> *Id.* at 2129.

<sup>192</sup> *Id.* at 2125.

<sup>193</sup> RESTATEMENT (SECOND) OF AGENCY § 217C (1957).

<sup>194</sup> *Kolstad*, 119 S. Ct. at 2129.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> 524 U.S. 742 (1998).

<sup>198</sup> 524 U.S. 775 (1998).



defense in order to avoid liability in sexual harassment hostile environment cases that do not involve a tangible employment action.<sup>199</sup> This case reinforces the clear message conveyed to employers in *Burlington Industry*<sup>200</sup> and *Faragher*<sup>201</sup> – namely that employers can protect themselves from liability by adopting anti-discrimination policies and effectively disseminating information about those policies throughout the workplace.<sup>202</sup>

What is much less clear is the intersection between *Kolstad*<sup>203</sup> and the earlier decisions in *Burlington*<sup>204</sup> & *Faragher*.<sup>205</sup> The rule articulated in *Kolstad* refers to managers,<sup>206</sup> but the Court offers no fully developed definition of a manager other than noting that a manager is an employee who is important but not necessarily top management.<sup>207</sup> It remains to be seen how or whether this coincides with the Court's use of the term supervisor, defined as one with immediate or successively higher authority over the employee.<sup>208</sup> If supervisors and managers are identical, one would think the Court would have used the same term. Further, is the employer liable for punitive damages when the discrimination consists of a tangible employment action such as one that significantly changes an employee's status or is the good faith defense available even in those cases? Under *Burlington*, tangible employment action is deemed to be the action of the employer because it requires an official act of the enterprise.<sup>209</sup> In such a case, is the good faith defense available? One would think not, although the issue is not addressed in the opinion.

Another issue that remains unclear in *Kolstad* relates to the contours of this good faith defense.<sup>210</sup> How is it to be satisfied? Is

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<sup>199</sup> *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

<sup>200</sup> 524 U.S. 742 (1998).

<sup>201</sup> 524 U.S. 775 (1998).

<sup>202</sup> *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

<sup>203</sup> 119 S. Ct. 2118 (1999).

<sup>204</sup> 524 U.S. 742 (1998).

<sup>205</sup> 524 U.S. 775 (1998).

<sup>206</sup> *Kolstad*, 119 S. Ct. at 2128.

<sup>207</sup> *Id.*

<sup>208</sup> See *Burlington*, 524 U.S. at 765. (citing *Faragher*, 524 U.S. at 807).

<sup>209</sup> *Burlington*, 524 U.S. at 762.

<sup>210</sup> *Kolstad*, 119 S. Ct. at 2129.

merely having an anti—discrimination policy sufficient? The Tenth Circuit, in one of the first cases<sup>211</sup> to interpret *Kolstad*, recently answered this question and held that an employer was vicariously liable for punitive damages despite the fact that it had a written nondiscrimination policy.<sup>212</sup> The Court held that *Kolstad*'s good faith defense was unavailable to the employer, Wal-Mart, because despite its written nondiscrimination policy, it had failed to make a good faith effort to educate its employees. Thus, an award of \$75,000 in punitive damages was upheld.<sup>213</sup>

*Kolstad*'s message to employers could not be clearer – Prevention is the way to avoid liability.<sup>214</sup> What does prevention consist of? Answers are suggested in EEOC recommendations released on June 18, 1999,<sup>215</sup> which management advisors are instructing companies to adopt. For those of you in the audience in a position to advise employers, here is a sampling of steps that employers can and should take:

- \*Creating and disseminating a strong anti-harassment policy, including training programs for employees and supervisors.

- \*Encouraging employees and supervisors to report any harassment they observe.

- \*Developing flexible complaint procedures.

- \*Designating someone outside the employee's chain of command to hear harassment complaints.

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<sup>211</sup> Equal Employment Opportunity Commission v. Wal-Mart Stores, Inc., 187 F.3d 1241 (10<sup>th</sup> Cir. 1999).

<sup>212</sup> *Id.* at 1248-49. The Court stated that a "written policy against discrimination . . . alone is not enough," and found that Wal-Mart had not engaged in a "good faith effort to educate its employees about the ADA's prohibitions." *Id.*

<sup>213</sup> *Id.* at 1249. The Court stated that "[g]iven the intentional and flagrant violation of the ADA in this case, the award of \$75,000, one-fourth the statutory maximum, does not shock our judicial conscience." *Id.*

<sup>214</sup> *Kolstad*, 119 S. Ct. at 2129. "[G]iving punitive damage protection to employers who make good-faith efforts to prevent discrimination in the workplace accomplishes Title VII's objective of motivating employers to detect and deter Title VII violations." *Id.* (citing *Kolstad*, 139 F.3d 958,974 (D.C. Cir. 1998)) (Tatel, J., dissenting).

<sup>215</sup> EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPLIANCE MANUAL 915.002, COMMISSION'S ENFORCEMENT GUIDANCE: VICARIOUS LIABILITY FOR UNLAWFUL EEOC HARASSMENT BY SUPERVISORS (June 18, 1999).

\*Investigating complaints promptly & taking immediate corrective action.

If an employer were to adopt these measures, it seems clear that the employer would be protected against liability for punitive damages under the standard adopted in *Kolstad*.<sup>216</sup>

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<sup>216</sup> *Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118 (1999).